PUBLIC PROSECUTOR v. YAP SIONG

[O.Cr. J. (Mohamed Azmi J.) July 21, 1982]
[Kuala Lumpur — Federal Territory Criminal Trial No.4 of 1981]

Criminal Law and Procedure – Trial for murder – Defence that accused was of unsound mind – Direction by judge that jury should return a verdict of not guilty by reason of unsoundness of mind – Jury returning unanimous verdict of "not guilty of any offence" – Perverse verdict – Whether trial judge is bound to accept verdict – Retrial ordered – Whether accused has right to appeal – Criminal Procedure Code, S. 225, 229 – Courts of Judicature Act, 1964, s. 50.

In this case the accused was charged with murdering his own father. The prosecution produced evidence to show that the accused assaulted his father with an iron pipe. The defence did not dispute the fact that it was the accused who killed his father but called evidence to show that the accused was of unsound mind at the time he committed the act. The learned trial judge urged the jury to accept the defence and to return a verdict of "not guilty by reason of unsoundness of mind". The jury however returned a unanimous verdict of "not guilty of any offence". The foreman indicated that the jury were not convinced with both the prosecution and defence story that it was the accused who did the killing.

Held: (1) the verdict of the jury was perverse and in the circumstances could not be accepted and a retrial should be ordered before another jury;

(2) with the amendment of section 50 of the Courts of Judicature Act, 1974, which gives a right to the Public Prosecutor to appeal against an acquittal, it is only mandatory for the Judge to record an order of acquittal under section 299 of the Criminal Procedure Code where the jury's verdict is not perverse;

(3) the appellant in this case was not a convicted person and had no right of appeal; moreover as there was no conviction or sentence the appeal was untenable.

Cases referred to:

(1) *Loo Geok Hong* v. *Public Prosecutor* [1961] M.L.J. 157.
(2) *Attorney-General for Ceylon* v. *Perera* [1953] A.C. 200.
(3) *R.* v. *Ian Drury* (1972) 56 Cr. App. R. 104.
(4) *R.* v. *Gary Kirby* (1972) 56 Cr. App. R. 758.
(5) *Public Prosecutor* v. *Lim Cheng Chooi* Federal Court Criminal Appeal No. 11 of 1982.

CRIMINAL TRIAL.

Gooi Soon Seng (Deputy Public Prosecutor) for the prosecution.

Lim Soh Wah for the accused (assigned).

Cur. Adv. Vult.

Mohamed Azmi J.: The Accused is charged for murdering his own father and the charge preferred is in the following terms:–

"That you on September 7, 1980, at about 6.30 p.m. at house No. 361, Jalan Jambu Berasa Dua, Jinjang Selatan, in the Federal Territory of Kuala Lumpur, did commit murder by causing the death of one YAP KEE I/C 3417040 (B) and that you have thereby committed an offence punishable under section 302 of the Penal Code."

It is the case for the Prosecution that the Accused killed his father with an iron pipe Exihibit P.3 in the hall of the house where they were staying together with P.W.1, P.W.2 and P.W.1's husband. The unchallenged evidence of Wong Sau Ping (P.W.1) the wife of Accused's nephew, shows that at the material time, she saw the Accused attempting to assault deceased with the iron pipe. At that time, the deceased was lying on the floor and she saw blood on the floor and deceased was bleeding from the head. When she saw Accused trying to assault the deceased with the iron pipe, she rushed forward and pushed the Accused away. The Accused turned to attack her with the iron pipe and she ran away calling out for her brother-in-law Cheong Saik Kong (P.W.2). Apart from the Accused and the deceased, P.W.1 did not see anyone else in the hall. P.W.1's evidence is corroborated by P.W.2 who heard P.W.1 screaming for help and shouting in Chinese "Uncle has killed grandpa". When he rushed to the hall, he also saw his uncle the Accused holding an iron pipe with his grandfather the deceased lying on the floor bleeding heavily on the head. Eventually he and P.W.1's husband managed to overpower the Accused. Although P.W.1 and P.W.2 did not see the actual assault, the circumstances under which the Accused was seen with the deceased could only lead to the inference that he was responsible for the killing. The Pathologist, Dr. Joko Suko Haryono (P.W.3) who did the postmortem, testified that the deceased died of shock due to fracture of the skull with evidence of bleeding in the brain. His opinion is that the skull fracture was consistent with having been caused by the iron pipe. At the close of case for the Prosecution, Mr. Lim Soh Wah, Counsel for the Accused, acted correctly in not making any submission of no case to answer, as there was strong circumstantial evidence that it was the Accused who delivered the blow on deceased's head with the iron pipe, as a result of which the deceased died due to fracture of the skull and bleeding in the brain. Having regard to the weapon used and the nature of the head injury, there was also sufficient evidence that the Accused delivered the blow with the intention to kill. The Defence did not dispute that it was the Accused who killed his father, but called Dr. Quek Seng Lian (D.W.1), a Psychiatrist, to prove that the Accused was of unsound mind at the time he

committed the act. According to Dr. Quek's evidence, Accused is suffering from schizophrenia and has been a mental patient under his charge since 1975, although Accused has been in and out of mental home at Tanjong Rambutan since 1962. The main symptom is that Accused believed he was being haunted by communist terrorists, and he told Dr. Quek that he killed his father genuinely believing him to be a communist infiltrator.

In the course of my summing-up, having regard to the evidence, I urged the Jury to accept the defence of insanity under section 84 of the Penal Code, and to return a verdict of "not guilty by reason of unsoundness of mind". However, in spite of my direction, the Jury returned a unanimous verdict of "not guilty of any offence". On the evidence, I am of the view that the verdict is perverse particularly when the Foreman indicated that the Jury came to that verdict because they were not convinced with both the Prosecution and Defence story that it was the Accused who did the killing. If they rejected the common version of the Prosecution and the Defence as to the killing, they could not have arrived at their conclusion based on the evidence before them. In the circumstances, I did not accept the Jury's verdict and ordered a re-trial before another Jury. I am aware that under section 229 Criminal Procedure Code, if the Jury's verdict is not guilty either unanimously or by a majority, the Judge shall record judgment of acquittal; but, in my view, where the verdict is clearly perverse, the court has the inherent power to order a re-trial. The facts of this case are so clear that no reasonable Jury would have come to any conclusion other than the Accused did kill his father as alleged by the Prosecution and admitted in Defence submission. Though the Prosecution evidence in this case is circumstantial, neither P.W.1 nor P.W.2's testimony was challenged by the Defence in cross-examination. The Prosecution version is that on circumstantial evidence, it was the Accused who killed his father with the iron pipe Exhibit P.3. The Defence in cross-examination and in Counsel's submission to the Jury did not challenge this fact. On the contrary, Defence own witness Dr. Quek (D.W.1) testified that in the course of treating the Accused for his mental illness, the Accused told him that he did kill his father genuinely believing that he was a communist infiltrator. Under section 225(a) Criminal Procedure Code, it shall be the duty of the Jury to decide which view of the facts is true and then should return a verdict which under such view ought, according to the direction of the Judge, to be returned. In my summing-up, the three alternative verdicts were conveyed to the Jury as a formality. A Judge sitting with a Jury should put to them any defence available on the evidence irrespective of whether or not reliance was placed on it at the trial. (See *Loo Geok Hong* v. *Public Prosecutor.*[1] where the Appellate Court followed *Attorney General for Ceylon* v. *Perera*[2]). In effect, I urged them in no uncertain terms, having regard to the evidence to return a verdict of not guilty by reason of unsoundness of mind. By rejecting both the Prosecution and Defence version that the Accused did kill his father and returning a verdict of not guilty of any offence, it is clear that the Jury have not decided which view of the facts on the evidence before them is true. Since both the Prosecution and the Defence were of the same view that it was the Accused who did the killing, the Jury's conclusion must be based on pure conjecture. By rejecting both the Prosecution and Defence view of the facts, the Jury's verdict is not based on evidence adduced in Court and, as such, it is perverse not only because of their failure to comply with section 225(a) Criminal Procedure Code but also on the ground that no reasonable jury who had properly applied their minds to the facts in this case could have arrived at the conclusion that the Accused did not kill his father. (See *R.* v. *Ian Drury*[3] and *R.* v. *Gary Kirby*[4]). By rejecting both the Prosecution and Defence version, the Jury were adopting their own version which is not based on any scrap of evidence before them. In the circumstances, I find their verdict is perverse. I reject it and order a re-trial before another jury.

Further, the very concept of jury trial is that as the jury are judges of facts, there should not be any right of appeal against acquittal by the Prosecution. As such, the jury are *functus officio* once they return their verdict. That seems to be the rationale behind section 229 Criminal Procedure Code. But, since January 23, 1976 by Act A328 a new subsection (2A) has been inserted into section 50 of the Courts of Judicature Act 1964 which gives a right to the Public Prosecutor to appeal against acquittal. This is a drastic encroachment into the concept of jury trial under Chapter XXII of Criminal Procedure Code. To my mind, since their findings of facts ending in an acquittal are now appealable at the instance of the Public Prosecutor, the Jury are not *functus officio* even after they have returned their verdict and the Judge has the right to discharge them

where the verdict is perverse. Otherwise, the trial Judge will be in an awkward position when there is an appeal against acquittal. On the one hand, he has to connive with the Jury's perverse verdict of "not guilty of any offence" and record an order of acquittal, and yet on appeal against the said acquittal, he has to write a judgment agreeing that he is wrong in making such order. In the face of such impossible position, I think, with effect from January 23, 1976, it is only mandatory for the Judge to record an order of acquittal under section 229 Criminal Procedure Code where the Jury's verdict is not perverse.

Be that as it may, I think the Accused has no right of appeal in this case. In *Public Prosecutor* v. *Lim Cheng Chooi*[5], the Public Prosecutor appealed against the decision of the High Court wherein the trial Judge had amended the charge from an offence under section 304 of the Penal Code to one under section 304A of the same code and sentenced the respondent to a fine of $2,000/- in default three months imprisonment. The Federal Court dismissed the appeal without going into its merits on the ground that under sub-section (2A) of section 50, Courts of Judicature Act, an appeal by the Public Prosecutor shall be only against either acquittal or sentence. As such, the decision of the trial Judge in reducing the charge from section 304 to section 304A Penal Code was held not appealable. Similarly, I am of the view the present appeal is untenable on the ground the Appellant can only appeal against conviction or sentence or both under the provision of sub-section 2 of section 50 Courts of Judicature Act 1964 (Revised 1972), the relevant part of which provides:

"An appeal by a person convicted shall be either against the conviction or against the sentence or against both ..."

In this case, the Appellant is not a convicted person and, as such, there is no right of appeal. Even if he can be considered as a convicted person, his right of appeal is limited – against conviction or sentence or against both. As there is no conviction or sentence to be appealed against, the present appeal is untenable.

Appeal untenable.

PUBLIC PROSECUTOR v. ABDULLAH BIN ISMAIL

[A.Cr. J. (Seah J.) September 18, 1982]
[Kuching – Criminal Appeal No. KG 9 of 1982]

Criminal Law and Procedure – Summary trial – Procedure at end of prosecution case – Test of prima facie case – Charge of attempted rape – Evidence given by complainant not inherently incredible – Criminal Procedure Code, section 173(f).

In this case the respondent was charged with attempted rape. The learned President of the Sessions Court acquitted him and he stated –

"At the close of the case for the prosecution it is the duty of the court to determine whether or not the evidence tendered by the prosecution, if unrebutted, has established the case against the accused beyond all reasonable doubt. Before calling upon the accused to make his defence, the court has only to be satisfied that the prosecution has made out a *prima facie* case against him".

The Public Prosecutor appealed.

Held: (1) the learned President of the Sessions Court had applied the wrong test. At the close of the prosecution case the test of a *prima facie* case is not "Has the prosecution evidence established the case against the accused beyond a reasonable doubt?" but rather "If I were to accept the prosecution evidence as accurate would it establish the case against the accused beyond a reasonable doubt?";

(2) The evidence of the complainant in this case could not be said to be so inherently incredible as to be incapable of belief by a reasonable person and therefore in this case a *prima facie* case had been made out by the prosecution evidence which if unrebutted would warrant the conviction of the accused as charged;

(3) the order of discharge and acquittal should be set aside and the case remitted to the President of the Sessions Court for him to call upon the accused for his defence.

Cases referred to:

(1) *A. Ragunathan* v. *Pendakwa Raya* [1982] 1 M.L.J. 139.
(2) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.
(3) *Ong Kiang Kek* v. *Public Prosecutor* [1970] 2 M.L.J. 283.

CRIMINAL APPEAL.

Nik Hashim bin Nik Abdul Rahman (Deputy Public Prosecutor) for the appellant.
Respondent in person.

Cur. Adv. Vult.

Seah J.: This is an appeal by the Public Prosecutor against the decision of the President of the Sessions Court at Kuching dated February 27,